

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

IN RE:)
) CA No. 01-12257-PBS
PHARMACEUTICAL INDUSTRY AVERAGE)
WHOLESALE PRICE LITIGATION) Pages 1 - 30
)

MOTION HEARING

BEFORE THE HONORABLE PATTI B. SARIS
UNITED STATES DISTRICT JUDGE

United States District Court
1 Courthouse Way, Courtroom 19
Boston, Massachusetts
August 10, 2009, 4:10 p.m.

LEE A. MARZILLI
OFFICIAL COURT REPORTER
United States District Court
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1 A P P E A R A N C E S:

2
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4 LLP, 55 Cambridge Parkway, Suite 301, Cambridge,
5 Massachusetts, 02142, for the Class Plaintiffs.

6
7 AMBER M. NESBITT, ESQ., Wexler Wallace, LLP,
8 55 West Monroe Street, Suite 3300, Chicago, Illinois, 60603,
9 for the Class Plaintiffs.

10
11 LYNDON M. TRETTER, ESQ., (By Telephone) Hogan & Hartson,
12 LLP, 875 Third Avenue, New York, New York, 10022,
13 for the Defendant, Bristol-Myers Squibb.

P R O C E E D I N G S

THE CLERK: In Re: Pharmaceutical industry
Average Wholesale Price Litigation, Civil Action 01-12257,
will now be heard before this Court. Will counsel please
identify themselves for the record.

MR. NOTARGIACOMO: Good afternoon, your Honor. Ed
Notargiacomo from Hagens Berman Sobol Shapiro for the class
plaintiffs.

MS. NESBITT: Good afternoon, your Honor. Amber
Nesbitt of Wexler Wallace, LLP, also on behalf of the class
plaintiffs.

THE COURT: Mr. Tretter, I hear you're somewhere.

MR. TRETTER: Yes, your Honor, I'm in bed. Thank
you for allowing me to participate by phone.

THE COURT: From what I hear about your physical
state, I didn't want you up here.

MR. TRETTER: Well, I've learned it's not
contagious. It felt like the flu, but actually it was food
poisoning.

THE COURT: Oh, I'm sorry about that.

MR. TRETTER: But thank you very much for your
concern.

THE COURT: Tell me about this settlement. In
particular, anything unusual about it?

MR. NOTARGIACOMO: Your Honor, the settlement, the

1 structure of the settlement is very similar to the
2 settlements that have been previously presented and approved
3 by the Court with very little exception. The only real
4 difference is, of course, the drugs involved and the amount
5 of money to be paid by the defendant.

6 THE COURT: No odd release language?

7 MR. NOTARGIACOMO: The release language is based
8 on, if not identical -- I haven't checked word for word --
9 but it's based on the release language in the AZ settlement
10 and the GSK settlement, and I think the Track Two
11 settlement.

12 THE COURT: Are there any other pending lawsuits
13 or possible pending lawsuits involving these drugs?

14 MR. NOTARGIACOMO: Not that I am aware of, your
15 Honor.

16 MR. TRETTER: There was one case by Mr. Haviland
17 involving Arizona plaintiffs, but that's recently been
18 dismissed; I mean, very recently.

19 THE COURT: This recently came up in my McKesson
20 case in a way that I hadn't anticipated, and I wanted to
21 know whether there was some other lawsuit that is somehow
22 implicated in this.

23 MR. TRETTER: The only other lawsuit, your
24 Honor -- and I think they're expressly excluded by the
25 release -- are lawsuits on behalf of state Medicaid that

1 might involve these particular drugs, but that's outside of
2 this settlement by the express terms.

3 THE COURT: And what is the claims process?

4 MR. NOTARGIACOMO: The claims process will be
5 similar to that devised for Track Two. That is, for -- I'll
6 take each of the classes, the consumer classes. Class 1,
7 they will be notified with a short two-page initial notice
8 with a return mail card that they just have to sign to
9 verify that they made either a full payment, or, in the case
10 of Class 1, it should be just a percentage copayment; and
11 that gets returned to the claims administrator. Based on
12 that representation, they get sent a full notice. That
13 notice will either be one of two types: It will either be a
14 notice that gives them a right to opt out if they live in
15 certain states that had not previously been noticed prior to
16 the Massachusetts, the BMS trial.

17 THE COURT: Wait, wait, wait, wait. Nobody would
18 have been noticed other than Massachusetts. You mean in the
19 national -- I don't know what you mean.

20 MR. NOTARGIACOMO: There was -- well, I'm sorry.
21 You certified --

22 THE COURT: A national.

23 MR. NOTARGIACOMO: -- a national class but
24 excluding certain states.

25 THE COURT: Did we ever send out notice? That was

1 one of the things that confused me. I didn't think we sent
2 out notice because it went up on appeal.

3 MR. TRETTER: Class 1? I don't think Class 1 ever
4 went on appeal.

5 THE COURT: All right, so this where I've got to
6 get this straight. This is only Class 1?

7 MR. NOTARGIACOMO: Correct, your Honor.

8 THE COURT: So the opt-out option --

9 MR. NOTARGIACOMO: Applies to those states that
10 weren't previously provided -- consumers in those states who
11 weren't previously provided an opt-out option. So if
12 they're from one of those states, they'll get a notice very
13 similar to the other notice, but it provides them with an
14 option to opt out.

15 THE COURT: So can we just -- I have so many of
16 these cases. Class 1 I certified for Massachusetts only and
17 made certain findings.

18 MR. TRETTER: No.

19 MR. NOTARGIACOMO: No.

20 MR. TRETTER: Class 1 is the Medicare consumers.

21 THE COURT: So the Medicare consumers. Was it
22 national, or was it class?

23 MR. TRETTER: It was national, and it was -- it
24 was almost national. I think what Ed is saying is that
25 there were a few states that you didn't certify that were

1 now included in the settlement.

2 THE COURT: So if there was a national settlement
3 before and I sent out a notice, what is new about this? Is
4 it that we've added states?

5 MR. NOTARGIACOMO: Yes.

6 MR. TRETTER: I think there are about six states
7 that were not previously certified in your ruling that are
8 now part of a settlement class.

9 THE COURT: But am I right in remembering that
10 whatever the settlement was in Class 1 was agreed upon by
11 everybody, right, so it was never paid?

12 MR. TRETTER: What happened is, there was --

13 THE COURT: I'm just trying to get a history. I'm
14 not understanding. We settled -- there are three things I
15 remember about Bristol-Myers. One piece went to trial which
16 was only --

17 MR. TRETTER: Class 2/Class 3 Massachusetts.

18 THE COURT: Right, and that went up on appeal.

19 MR. TRETTER: Correct.

20 THE COURT: Then there was a national class that I
21 certified at some point which is on appeal.

22 MR. TRETTER: The national class was -- no. Oh,
23 national Class 2/Class 3, let's call that one "multistate"
24 because you excluded many states. That one you never
25 entered the order because you were waiting for the First

1 Circuit appeal.

2 THE COURT: Perfect. Now, this Bristol-Meyers
3 Class 1 I thought had been settled years ago, so it was a
4 bit of a surprise to me, when I finally focused on it, that
5 we're coming back again at it. And it's all of the classes,
6 right?

7 MR. TRETTER: Fair enough. Let me try to explain
8 what happened with Class 1. There was your Class 2/Class 3
9 Massachusetts decision in June, 2007, and a couple of weeks
10 thereafter there was a memorandum of understanding between
11 BMS and Class 1. It never went past the memorandum of
12 understanding phase. I think that's what your Honor has in
13 mind.

14 MR. NOTARGIACOMO: But it was presented to you
15 because there was a disagreement about how to interpret the
16 MOU, and we sought your guidance with respect to that. And
17 there was a minute order with respect to that. And it was
18 shortly after that decision by your Honor or minute order on
19 the MOU that we went back to Professor Green, who oversaw
20 all of these negotiations, and we were able to hammer out a
21 national settlement that included all three classes, not
22 just Class 1 that had been the previous subject of the MOU.

23 MR. TRETTER: Exactly.

24 THE COURT: So when you're allowing -- this is
25 what's confusing me -- so now you're allowing an opt-out but

1 only for certain states in Class 1.

2 MR. TRETTER: Because nobody ever appealed -- in
3 your original 2005 or 2006 class decision when you first
4 certified only a Massachusetts 2 and 3, you did also certify
5 an almost nationwide Class 1. Nobody ever appealed that.

6 THE COURT: Oh, all right. But did notice ever go
7 out?

8 MR. TRETTER: That would be class counsel.

9 MR. NOTARGIACOMO: For Class 1 notice -- I have to
10 think back now myself.

11 THE COURT: Because the only question that I had
12 in reading it was, I wasn't sure why there was only an
13 opt-out for certain states and not other states. And so I
14 couldn't remember whether we'd ever sent out notice, or
15 indeed whether -- I had sort of a memory it was settled, so
16 the history wasn't --

17 MR. NOTARGIACOMO: I believe there was national
18 publication notice.

19 THE COURT: I don't remember.

20 MR. NOTARGIACOMO: But I'd have to go back
21 truthfully --

22 THE COURT: Because otherwise it makes no sense
23 just to allow certain states an opt-out right. You would
24 want all states to have the opt-out right if we never
25 actually sent out a notice.

1 MR. TRETTER: Your Honor raises the right
2 question, which is, did class counsel after your first
3 decision on a nationwide class, which was only Class 1, did
4 some sort of notice go out at that time? And, if so, then
5 obviously only the new state Class 1 people would be
6 entitled to opt out. If not, then all of Class 1 would
7 be entitled.

8 THE COURT: Let me even play devil's advocate for
9 a minute because this is such a serpentine history of this
10 case. Arguably, even if I sent out notice, it was four
11 years -- how many years ago was it?

12 MR. NOTARGIACOMO: Three years ago.

13 THE COURT: Four years ago, three or four years
14 ago? Should we just do it again? It's so long ago that I
15 couldn't remember, and you can't remember.

16 MR. NOTARGIACOMO: I'm the one who should
17 remember, your Honor, of all of us.

18 THE COURT: Mr. Tretter can't remember.

19 MR. TRETTER: Mr. Tretter is sick, so he, you
20 know, he definitely can't remember.

21 THE COURT: Yes, but I'm not. I have no excuse
22 for the deficit, the mental deficit here.

23 MR. NOTARGIACOMO: I do believe there was national
24 publication notice. I don't believe that -- no, no, no, I'm
25 sorry, your Honor. I'm now remembering what we did get from

1 CMS at the time were the names and addresses, not the actual
2 payment information but the names and addresses for
3 Track One drugs, everyone who had a Track One drug, and I
4 believe mail notice went out to those people. I will have
5 to check that, your Honor, and get back to you.

6 THE COURT: You just should verify that because
7 let me just say, if there was actual mail notice, I don't
8 think there's a need to go back, but was it a different
9 settlement at that point?

10 MR. TRETTER: Well, it would have been a
11 litigation class, your Honor. At that point, when you
12 certified, you certified as to Track One. Ed's right. It
13 was J&J and GSK. It was all five defendants, but GSK was
14 the first to settle. But there was a litigation class, a
15 nationwide litigation Class 1 that was created with a few --

16 THE COURT: Right, but now that I've got a
17 settlement, shouldn't I tell them what it is so that they
18 can opt out?

19 MR. TRETTER: Well, I think the rules on class
20 actions are, if you receive a litigation notice as a class
21 member, you can't opt out of the settlement. You can
22 object, but you're bound.

23 THE COURT: Let me put it this way: I don't
24 remember, but I at least think for the record we need -- I
25 also seem to remember some complaints from class counsel

1 about how expensive it was. I don't remember with
2 precision. But we at least should have for the record what
3 happened, what it was notified for, and why I'm only
4 allowing opt-out with respect to certain classes, if in fact
5 individual mail notice went to virtually everyone.

6 MR. NOTARGIACOMO: I am remembering now as we
7 discuss this, your Honor, that we did get names and
8 addresses of all those folks. I will verify still, but I
9 believe we sent actual mail notice. And the reason it was
10 so expensive is because -- and this needs to be part of the
11 way this settlement is structured -- that list that we get
12 from CMS, we can't tell who's a co-payor and who's not a
13 co-payor, who has Medigap insurance and who doesn't. So we
14 sent it to all of those people regardless. It was
15 overinclusive.

16 THE COURT: So aren't you going to have to do the
17 same thing with the states that weren't included before?

18 MR. NOTARGIACOMO: Well, we will be doing that
19 with everyone on the CMS list. Everyone will get that two-
20 or three-page short notice with a card. Only those who
21 apply and say, "Yes, I'm one of the class members who
22 actually made a percentage copayment --"

23 THE COURT: Back up for a minute. I'm sorry to
24 keep you --

25 MR. NOTARGIACOMO: That's okay.

1 THE COURT: Your proposal is, do you have a CMS,
2 Center for Medicare and Medicaid Services, list for everyone
3 in the country?

4 MR. NOTARGIACOMO: Yes.

5 THE COURT: And resend out a notice?

6 MR. NOTARGIACOMO: Everyone in Class 1 who's on
7 that CMS list would get the short Class 1 notice with a
8 return reply.

9 THE COURT: So everyone in the United States of
10 America. And is it just co-payors, or is it also people who
11 paid --

12 MR. NOTARGIACOMO: CMS would only have -- would
13 have individual --

14 THE COURT: Well, then once you're sending it out
15 to everyone, why don't I give everyone an opt-out right?

16 MR. NOTARGIACOMO: It's certainly within the
17 Court's --

18 THE COURT: I mean, I'm allowed to do a second
19 opt-out. It's been four years. It might be worth doing.

20 MR. TRETTER: You know, I don't think BMS would
21 object. I'd like to know what the answer was on the first
22 before committing.

23 THE COURT: So now that there's no extra expense
24 and it's been four years, unless there's a good reason not
25 to and I have the second opt-out right, let's just do it and

1 do this right, and then -- our experience is, very few
2 people opt out actually. Very few people claim, but very
3 few people opt out, but at least it's direct mail notice.
4 And then we'll -- so we don't have to make it just those
5 states. It makes it actually easier.

6 MR. NOTARGIACOMO: That's fine, your Honor. It's
7 just a matter of rather than sending back, you know, two
8 different notices, depending on state, we'd send back the
9 exact same notice, and it would have the opt-out paragraph
10 in it.

11 THE COURT: Yes, okay. So then the next issue,
12 all right, so now we've taken care of Class 1, and the
13 TPP --

14 MR. NOTARGIACOMO: But let me just finish Class 1.

15 THE COURT: Yes, yes.

16 MR. NOTARGIACOMO: So the second round, everyone
17 who sent back that card would get a full notice with an
18 individualized, you know, sheet that actually shows what CMS
19 data tells us their payments were. They review that, and if
20 they have no qualms with it and no changes to it, they don't
21 have to do anything else. The claims administrator will
22 determine what their claim is based on the distribution
23 approved by the Court, and they'll get a check without
24 having to do anything more. If they disagree with it, they
25 can provide the claims administrator with different

1 information --

2 THE COURT: Okay, good, so it's easy.

3 MR. NOTARGIACOMO: It's easy.

4 Class 2 are third-party payors. Just like
5 third-party payors in Class 3, they'll get a direct mail
6 notice, and there will also be publication in some trade
7 magazines, which we've done before. We never have any
8 problems having TPPs file claims.

9 THE COURT: All right.

10 MR. NOTARGIACOMO: In Class 3, we propose a
11 publication notice in three major national magazines. I
12 believe they are People Magazine, Newsweek, and TV Guide,
13 along with notice on the Web and press releases, as well as
14 contact with a number of organizations, grass-root
15 organizations that deal specifically with people with
16 medical conditions.

17 THE COURT: And before in one of the other cases,
18 we were able to get lists from the third-party payors back
19 to a certain period of time, and then the lists were lost.
20 Are you doing that here?

21 MR. NOTARGIACOMO: We're not doing that here, and
22 specifically because with respect to the damages with
23 respect to BMS, Class 3 is very, very small, much smaller
24 than -- and I'm not sure exactly why. Well, I think the
25 reason why is that these drugs are drugs that are primarily

1 taken by the elderly, and they are covered by Medicare.

2 MR. TRETTER: No, no. The reason is because they
3 were multi-source for very long periods of time, and
4 therefore, even under Hartman's analysis, there would have
5 been no Class 3 damages. In other words, a drug that went
6 multi-source in 1993, you know, within six months would have
7 had a MAC, so there was no Class 3 damages. I think that
8 there was a very short window of Class 3 damages which was
9 for one drug, Taxol, for a six-month period in 2001.

10 MR. NOTARGIACOMO: There's a smattering of damages
11 in some small period for some of the other drugs in Class 3,
12 but for the most part, Class 3 is very, very small, in the
13 order of less than one percent of the damages. So class
14 counsel didn't feel it was cost-effective to go out and to
15 try to spend a lot of money to --

16 THE COURT: But can I play devil's advocate? Why
17 should we be advertising? Wouldn't it be -- because you're
18 not going to find these people that way. They tend to be
19 older and sicker. Last time we did this go-around, it cost
20 us almost a million dollars to publish in the magazines and
21 go on the Web, right? And we found we had almost -- almost
22 no claims came out of it.

23 MR. NOTARGIACOMO: That's true, but we've actually
24 scaled that down because we didn't feel spending a million
25 dollars to chase \$90,000 in damages in Class 3 made much

1 sense. So I think the estimates are between \$300,000 and
2 \$350,000 to do the publication and the Web and those things
3 that we propose to try to reach Class 3 members.

4 THE COURT: But could that money be spent just as
5 well having the -- I'm just playing this out because we've
6 done it before -- trying to go to the third-party payors and
7 say, try and find people from that time period Mr. Tretter
8 was talking about to see if we can find these people?

9 MR. NOTARGIACOMO: Going back that far, it's
10 almost impossible for any of those TPPs to go back that far
11 without having to resurrect computer systems that have long
12 been shelved.

13 THE COURT: We've done it in other cases, right?

14 MR. NOTARGIACOMO: But not going back that far.
15 In GSK, for instance, we had the TPPs give us what was on
16 their current system, so it went back four or five years in
17 some instances. But never, none of those TPPs could provide
18 us with names and addresses going back into the early '90s
19 or even mid-'90s because in sixteen years their computer
20 systems have changed two, three, four times. And even if
21 they exist, they're mothballed somewhere, and it's very
22 expensive to resurrect those systems to try to get the data
23 off the old tapes, for instance.

24 THE COURT: Well, this is what we should do, I
25 think, because I have no confidence that despite our

1 absolute best efforts, probably that will be consistent with
2 the due process clause but which are worrisome, I don't
3 think we're going to find these people with Parade Magazine
4 notice. So I'm wondering whether at least with respect to
5 the big TPPs who benefit the most -- who would they be,
6 the --

7 MR. NOTARGIACOMO: Usually, you know, Aetna,
8 WellPoint, Cigna. Those are the large --

9 THE COURT: Well, if you could call their counsel
10 and see if it's feasible. And I will just simply add in the
11 notice plan, to the extent feasible, the major TPPs, and
12 we'll see what we can do --

13 MR. NOTARGIACOMO: Does your Honor wish a report
14 at some very early point to say it's feasible, but it's
15 going to cost X number of dollars?

16 THE COURT: Yes.

17 MR. NOTARGIACOMO: Class counsel recommends we do
18 it or we don't do it?

19 THE COURT: Yes, I think that's fine, you know, an
20 exploration of the feasibility of doing it through TPPs, but
21 I don't want to hold up the publication plan. But if they
22 can do it, the TPPs have benefited hugely from these
23 settlements, so I don't mind if it cost them a little bit to
24 try and find -- it's, after all, their beneficiaries.

25 MR. NOTARGIACOMO: Would it make sense to move

1 things along if we say within the next two weeks we'll
2 provide you with a report?

3 THE COURT: That sounds fine.

4 MR. NOTARGIACOMO: I believe I can get that
5 accomplished.

6 THE COURT: Good, okay. All right, so that's the
7 claims process.

8 MR. NOTARGIACOMO: Well, with respect to Class 3,
9 assuming we reach those people, just like in Track Two,
10 they'll have two options: They can choose what's called the
11 easy refund option, I believe. And as long as they certify
12 that they made percentage co-payments for one or more of the
13 drugs, they'll receive a flat payment of \$35. Or they can
14 seek a full estimation refund and provide us with an
15 estimate of their out-of-pockets with respect to the drugs
16 and documentation for each one of those drugs, not for every
17 purchase, just one piece of documentation supporting their
18 claim for each drug that they're making a claim for, and
19 they will be provided the full amount of their --

20 THE COURT: Well, let me ask you this: Is \$35
21 enough money, given the fact at least some of BMS's drugs,
22 am I remembering correctly, tended to be of the more
23 expensive variety?

24 MR. NOTARGIACOMO: Some of them like Taxol and
25 others I believe are more expensive.

1 THE COURT: Like I remember, like, in the
2 thousands, right?

3 MR. NOTARGIACOMO: Depending on the course of
4 treatment, it can --

5 THE COURT: Right. I remember you flagged that in
6 your brief. So should it be more money?

7 MR. NOTARGIACOMO: Well, we certainly could
8 increase the \$35, or if there's money left over at the
9 end -- and I'm not sure there will be, depending on how the
10 CMS data comes back -- we could send a supplemental check to
11 those people who got the \$35 and increase it to \$50 or \$100
12 or however --

13 THE COURT: You don't care, Mr. Tretter, do you,
14 as long as it stays within the allocation?

15 MR. TRETTER: That's correct, your Honor.

16 THE COURT: Well, why don't we -- rather than have
17 it go into a cy pres fund, \$35 seems unreasonably -- well,
18 not unreasonably. For some of the drugs, just certifying
19 that you did it, you paid more than \$35. In other words,
20 just the fact that you -- almost every co-pay is going to be
21 higher than that, right?

22 MR. NOTARGIACOMO: If you're paying -- well, in
23 Class 3 they might be paying 20 percent. I'm not sure what
24 they --

25 THE COURT: Twenty percent, and what was the

1 typical course of treatment? I remember this. It was
2 \$1,200 or \$2,000 or something like that, right?

3 MR. TRETTER: A lot depends on the time period
4 that you're talking about, and it depends on the drug. Not
5 everyone will have taken the Taxol. That's where the
6 damages were found. But, you know, there are other people
7 that were taking cytoxan or things like that are very old
8 drugs that don't cost very much money.

9 THE COURT: I see. Well, that's very useful. So
10 I'm just wondering whether you could recalibrate it that
11 subject to availability, it would go up to treble damages.

12 MR. TRETTER: Well, my understanding -- and Ed can
13 correct me -- is that if they have some proof -- the \$35 is
14 for people with sort of a no-fault. In other words, "I
15 don't have any records, so I don't know, I just certify."
16 But if you have a record, you're eligible for a lot more.

17 THE COURT: Right, but let's face it, they're old
18 people who have got cancer, and it's sixteen years later.
19 Would you -- I don't keep my medical --

20 MR. TRETTER: Look, and, your Honor, we don't have
21 a dog in the fight.

22 THE COURT: Right, I mean, you don't have a dog,
23 and, I mean, I'm not an old person yet. I wouldn't keep
24 those records. I don't have my records from fifteen years
25 ago. Do either of you? No one has their records from

1 fifteen years ago, so it's unrealistic to think it's going
2 to happen, especially if they were old then and they were on
3 Medicare. What was that, sixty-five? So they're now in
4 their eighties, at least. So I'm thinking \$35 seems like
5 what most people are going to be getting.

6 MR. NOTARGIACOMO: You know, it's possible. One
7 of the things they could provide if they want a full refund
8 is a letter from the doctor's office.

9 THE COURT: Who's going to get a letter of sixteen
10 years ago? I mean, I'm just saying people are sitting in a
11 nursing home. I'm thinking you should -- what can we do at
12 this point? He doesn't care.

13 MR. NOTARGIACOMO: Well, we could try to choose a
14 figure, and rather than say, "You will receive --" I'm just
15 picking a number -- "\$150," we could say something like,
16 "You will receive up to a flat payment of \$150."

17 THE COURT: Why don't you just say "at least \$35"?

18 MR. TRETTER: May I make a -- are we talking about
19 Class 1 or Class 3 here?

20 MR. NOTARGIACOMO: Class 3.

21 MR. TRETTER: Who is it that gets the \$35? Is it
22 just Class 3, or is it Class 1?

23 THE COURT: Class 1 is easy because CMS tells you
24 exactly, exactly --

25 MR. TRETTER: So it's only the Class 3 consumers

1 that we're talking about?

2 THE COURT: Yes.

3 MR. NOTARGIACOMO: Well, I assume that they --

4 THE COURT: There are going to be almost none of
5 them. Let's start there. Maybe just say at least \$35 but
6 up to what? What do you think --

7 MR. TRETTER: Well, isn't there some way that you
8 could increase the minimum by decreasing the maximum and
9 still stay within whatever you've allocated to Class 3? In
10 other words, if you don't think people are going to go
11 through lots and lots of stuff to fill out what could be the
12 maximum, why can't you raise the minimum, and sort of
13 instead of trebling or whatever you're doing at the maximum,
14 doubling it. Does that make sense?

15 MR. NOTARGIACOMO: I'm not sure I understood it.
16 Did you understand it?

17 THE COURT: Maybe it's the food poisoning.

18 MR. TRETTER: Yes, it could be, could be.

19 THE COURT: I'm sort of thinking that I don't have
20 a silver number, bullet for this, but, I mean, we could say
21 a hundred bucks a person and I think still be pretty safe,
22 right? In other words, I think we --

23 MR. NOTARGIACOMO: We're talking about a small
24 number of people --

25 THE COURT: Of people, and you're talking about,

1 you can say up to what, \$35 times three, up to this amount,
2 because that's trebling if you were to use that as sort of a
3 liquidated. And that would be maybe closer to what --

4 MR. NOTARGIACOMO: -- \$105.

5 THE COURT: Yes, up to \$105, depending on how many
6 people claim or something.

7 MR. NOTARGIACOMO: Okay, we can --

8 THE COURT: We might actually get more people make
9 an effort to even just send in the form.

10 MR. NOTARGIACOMO: Right.

11 THE COURT: Does anyone have a problem with this?
12 No, okay. So then we've got --

13 MR. NOTARGIACOMO: Classes 1, 2, and 3 as far
14 as -- and then the other portion of it is the distribution.
15 We just talked about the claims process. The distribution
16 would be heavily weighted in favor of the three drugs that
17 have the most damages, cytoxan, Taxol, and Vepesid. So a
18 consumer's claim for out-of-pockets for those drugs would be
19 triple; and the out-of-pockets for the other drugs, they
20 would receive their out-of-pocket without a multiplier of
21 any sort. So it's only one time for the other four drugs,
22 where it's three times their out-of-pockets for cytoxan,
23 Taxol, and Vepesid. That applies to Class 1 --

24 THE COURT: That makes sense.

25 MR. NOTARGIACOMO: -- and Class 3 consumers who

1 take the --

2 THE COURT: And does this totally put the BMS to
3 bed?

4 MR. NOTARGIACOMO: Yes, it would, your Honor.

5 MR. TRETTER: Yes.

6 THE COURT: Okay, so --

7 MR. TRETTER: And we're working to get out of
8 Arizona case, your Honor. I think you're going to be able
9 to say "good-bye" to us.

10 THE COURT: So what's the date we should have for
11 the -- do we know of any objectors as we're sitting here?

12 MR. TRETTER: I'm sure Don Haviland will have
13 something to say.

14 THE COURT: Well, there have been an increasing
15 number of objectors each time I have one of these, so we're
16 the new feeding frenzy in town, and I just didn't know if
17 there were any issues we knew right now that were surfacing.

18 MR. NOTARGIACOMO: Nothing on preliminary
19 approval. But it's summer. I'm not sure if people are
20 paying attention to the docket. I'm sure, by the time we
21 get to final approval, we'll have people --

22 THE COURT: I mean, almost everything I have has
23 been going up on appeal, I think. We're up to the fourth?

24 MR. TRETTER: I mean, I think there is one issue
25 that your Honor should be attuned to, which is, when we

1 originally went with the MOU -- and this is discussed in the
2 class counsel's papers -- when we originally did the MOU and
3 we were just doing Class 1, it was \$13 million, and now it's
4 \$4 million and change for Class 1. And the reason is
5 because when we did that MOU and it was two weeks later, you
6 said, "Wait a second, the 30 percent rule applies to Class 1
7 as well." Well, then it became clear that the Class 1
8 damages were no higher than \$4 million. So this settlement
9 does provide for at least, you know, theoretically, if
10 everybody put in, a hundred percent of their damages, but
11 you should be aware of this.

12 THE COURT: Well, also conceivably, if I'm
13 remembering correctly, one of the issues on appeal is
14 whether that was a correct legal ruling.

15 MR. NOTARGIACOMO: That's correct, your Honor.

16 THE COURT: So is everyone taking those risks into
17 account as we go?

18 MR. TRETTER: Exactly.

19 MR. NOTARGIACOMO: Yes, I believe we are, your
20 Honor. That's one of the reasons that for some of the other
21 drugs that aren't in the top three, there's still a release
22 being provided. Even though the calculated damages were
23 small, one of the things that is being released is the
24 possibility that you might be overturned.

25 THE COURT: I could be overturned on any of it,

1 right, on both sides of this wagon?

2 MR. NOTARGIACOMO: Exactly.

3 MR. TRETTER: That's right. I mean, that's why
4 Eric Green got involved, and that's why it took a while.

5 THE COURT: It's been almost what, three-quarters
6 of a year, six months anyway, right, that --

7 MR. NOTARGIACOMO: Since you had the MOU issue in
8 front of you?

9 THE COURT: No, no, no, since it went up on
10 appeal, like, the argument was --

11 MR. NOTARGIACOMO: Oh, on the Massachusetts trial?
12 Yes, it's been fully briefed, and it's --

13 THE COURT: No, but I think it's been under
14 advisement for --

15 MR. TRETTER: What, the BMS appeal?

16 THE COURT: Yes, the whole thing has been --

17 MR. TRETTER: But it's been stayed. We got a stay
18 from the First Circuit when we reached the settlement.

19 THE COURT: I actually didn't know that. So
20 something must have --

21 MR. TRETTER: Oh, I'm sorry, your Honor.
22 Absolutely. As soon as we had the settlement, we didn't
23 want a decision.

24 THE COURT: Oh, I see. But is something still
25 percolating? Is it just AstraZeneca left?

1 MR. TRETTER: Well, it will be, yes. The answer
2 to that is -- well, I think the J&J case; in other words,
3 the class plaintiffs' appeal of the J&J aspect is still
4 there too.

5 THE COURT: Fair enough, fair enough. I forgot
6 that. All right, so thank you for alerting me to that.
7 Those are exactly what I want. I mean, at the last hearing
8 I hit an issue that no one flagged for me and just took me
9 aback, so I'd like to know as they percolate through.

10 So there is no other litigation affected. At
11 least with respect to BMS, it's stayed, an appeal. There's
12 a possible issue about a decrease from the memorandum of
13 understand till the present, which both sides have taken
14 into account, the fact that the case was pending on appeal.

15 So at this point I will approve it. You'll make
16 those changes, put in all the dates consulting with
17 Mr. Alba, and I'll sign it.

18 MR. NOTARGIACOMO: Very good, your Honor.

19 THE COURT: Okay, is there anything else I need to
20 know? No?

21 MR. NOTARGIACOMO: Not that I'm aware of.

22 MR. TRETTER: Thank you again, your Honor, for
23 letting me appear by phone.

24 MR. NOTARGIACOMO: As long as I'm here, your
25 Honor, and I know your Honor won't be here next week, a week

1 before -- this doesn't relate to BMS. It relates to the GSK
2 supplemental distribution. We had some moneys left over, a
3 considerable amount of money left over in the GSK consumer
4 pot. That went to Eric Green for mediation. He made a
5 determination and asked class counsel to submit to the Court
6 a schedule of a second distribution. And we did that about
7 a week and a half ago, and I just wanted to bring it to your
8 attention.

9 THE COURT: I'm glad you did because we don't
10 always see --

11 MR. NOTARGIACOMO: I'd like to get that money out
12 the door, if we can, to consumers because we actually --

13 THE COURT: I had thought I actually approved
14 that, but if I didn't, I will.

15 MR. NOTARGIACOMO: Well, I have to say I was on
16 vacation last week, and I haven't caught up with all of my
17 e-mail today, so it may be that your --

18 THE COURT: We'll check. It's possible. There's
19 so much in that case, and I have this other huge
20 multidistrict litigation which has been blossoming in my
21 time demands, and between the two, I could have missed it.
22 So as you always are, you call politely and let me know if I
23 haven't done some things, so that's fine.

24 Okay, thank you. Have a nice rest of the summer.
25 Mr. Tretter, get better.

1 MR. TRETTER: Thank you very much, your Honor.

2 THE COURT: Okay, bye-bye.

3 THE CLERK: Court is in recess.

4 (Adjourned, 4:39 p.m.)

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C E R T I F I C A T E

UNITED STATES DISTRICT COURT)
DISTRICT OF MASSACHUSETTS) ss.
CITY OF BOSTON)

I, Lee A. Marzilli, Official Federal Court
Reporter, do hereby certify that the foregoing transcript,
Pages 1 through 30 inclusive, was recorded by me
stenographically at the time and place aforesaid in Civil
Action No. 01-12257-PBS, In Re: Pharmaceutical Industry
Average Wholesale Price Litigation, and thereafter by me
reduced to typewriting and is a true and accurate record of
the proceedings.

In witness whereof I have hereunto set my hand
this 14th day of August, 2009.

/s/ Lee A. Marzilli

LEE A. MARZILLI, CRR
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